STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98 B 098

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

WILLIAM FRANCES HATZEL,

Complainant,

v.

DEPARTMENT OF CORRECTIONS,
DENVER RECEPTION AND DIAGNOSTIC CENTER,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on April 23, 1998 at 1525 Sherman Street, B-65, Denver, Colorado. Respondent was represented by Assistant Attorney General John A. Lizza. Complainant appeared and was represented by Joseph D. Dirscherl, Attorney at Law.

MATTER APPEALED

Complainant appeals a disciplinary termination. For the reasons set forth below, **Respondent is affirmed**.

PRELIMINARY MATTERS

1. Exhibits

Respondent's Exhibits 1 through 5, 7, 10, 15 and 18 were accepted into evidence without objection. Respondent's Exhibit 1 contained a typographical error on page 2 (two), which was corrected at hearing, to wit: The paragraph marked "IV S", second-to-last line, *should* read: "staff member will immediately inform *and* provide a written report to his/her appointing..." Respondent was also allowed to so amend Respondent's Prehearing Statement.

Complainant's Exhibits A through C were accepted into evidence without objection.

2. Witnesses

Respondent called the following witnesses: Dr. R. Mark McGoff, retired from the Department of Corrections (DOC) at the time of hearing, and the appointing authority in this matter; Captain James Knickerbocker, Correctional Support Supervisor / Head of the Food Service Department and Lieutenant Karen Lutz, Complainant's supervisor.

Complainant testified on his own behalf.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether the actions of Complainant warranted the disciplinary action imposed;

3. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;

4. Whether Complainant is entitled to attorneys fees and costs.

FINDINGS OF FACT

1. At the time of termination of his employment, Complainant held the rank of Sergeant with the Department of Corrections (DOC) and had worked for DOC in Food Service since May 1, 1994.

2. Dr. R. Mark McGoff requested and received proper appointing authority in this matter. (Respondent's Exhibit 4.)

3. In 1995 Complainant and his wife separated and were eventually divorced. There was one child of the marriage. The issue of child custody and parenting-time (visitation) was strongly contested and, during this period, Complainant's wife took out a restraining order against

Complainant.

4. Complainant was later charged with violation of that restraining order.

5. Through numerous conversations with Complainant, Complainant's direct supervisor, Lieutenant Karen Lutz, and Captain Knickerbocker both were generally aware of Complainant's "messy divorce" and the charge of violation of a restraining order.

6. On or about the late evening of January 7, 1998, Complainant was informed by his attorney that they were required to appear in court the next morning.

7. On or about January 8, 1998 Complainant did not report for work

8. On or about the evening of January 8, 1998 Captain Knickerbocker received a telephone call at home from Mr. Craig Sanders, who identified himself as Complainant's neighbor and indicated that Complainant was incarcerated in the El Paso County jail. Captain Knickerbocker so informed Dr. McGoff. (Respondent's Exhibit 5.)

9. Complainant's neighbor called Captain Knickerbocker at the request of Complainant.

10. On or about January 9, 1998 Complainant called Captain Knickerbocker from the El Paso County jail to further advise regarding Complainant's incarceration.

11. Complainant was released from jail, after serving five (5) days of a thirty (30) day jail sentence, when he posted an appeal bond in the case.

12. After his release from jail, Complainant and Captain Knickerboker met, by mutual request, regarding the nature of the charges that caused Complainant to be jailed.

13. Captain Knickerbocker researched Complainant's criminal background and determined that there were three (3) matters of concern:

a. Complainant had been charged in El Paso County Court with three (3) misdemeanors: assault, menacing and harassment. He was convicted of the charges on January 8, 1998 and was sentenced to an immediate thirty (30) days in jail. These charges stemmed from Complainant's former boarder who, upon moving out of Complainant's house, moved in with Complainant's ex-wife and filed charges against Complainant.

b. Complainant also appeared to be on probation for a 1995 violation of a restraining order.

c. While Complainant was incarcerated he was advised to appear in El Paso District Court on January 20, 1998 to answer charges of violating a restraining order and tampering with a witness. These charges were based on his speaking to his ex-wife outside the courtroom before his court appearance the morning of January 8, 1998.

14. At the time of sentencing in the El Paso County case, Complainant requested and was granted segregation from the regular County Jail population due to his employment by DOC.

15. Colorado Department of Corrections, Administrative Regulation No. 1450-1, IV., L. states: " Staff will avoid any conduct, on or off duty, that might compromise their integrity and betray the trust, faith, and confidence of the public in DOC. Staff will exercise good judgment and sound discretion." (Respondent's Exhibit 7.)

16. Colorado Department of Corrections, Administrative Regulation No. 1450-1, IV., S. states: "When a staff member is the subject of an external investigation, has been arrested for, charged with, or convicted of any crime or misdemeanor (except minor traffic violations), or is required to appear as a defendant in any criminal court, that staff member will immediately inform and provide a written report to his/her Appointing Authority who shall inform the Inspector General's Office." (Respondent's Exhibits 7 and 18 IV C.)

17. A copy of DOC Administrative Regulation No. 1450-1 was issued to employees in early March, 1997; was posted throughout the facility and a copy was included with Payroll documentation sent to employees.

18. Complainant's employment was terminated before the 1998 training which emphasized the requirement for written notification contained in Administrative Regulation No. 1450-1, IV., S.

19. During his employment with DOC, Complainant was aware of the requirement to notify the Department regarding court appearances and incarceration. He did not remember that the notification must be a.) in writing and b.) to the appointing authority.

20. In this case, Complainant gave verbal notification to his supervisor after his incarceration began. He did not at any time give written notification regarding these matters.

21. Complainant believed he was in compliance with the notice requirement.

22. Other DOC Food Service employees had, in the past, given verbal notification (without written notification) regarding misdemeanor cases and they were not disciplined for not giving written notification.

23. Notification of felony charges was always required to be in writing.

24. An R833 meeting was held January 26, 1998. In attendance were: Complainant; Mr. Larry Allen, Complainant's Manager; Mr. Anthony Moscetti, Complainant's advisor and Dr. McGoff, the appointing authority.

25. In making his decision, the appointing authority considered Complainant's statements at the R833 meeting. He also reviewed Complainant's employment record including Complainant's

personnel file, Complainant's past evaluations (Three (3) were "commendable", Complainant's Exhibit B.) and particularly Complainant's most recent evaluation in which Complainant received a "good" rating. He considered the fact that Complainant had been a "fully acceptable employee". He reviewed eight (8) pages of court documents relating to Complainant's court cases and he reviewed similar incidents within the department. He reviewed Department Standards. (Respondent's Exhibit 7.) He also considered the "need for consistency" within the Department.

26. The appointing authority, Dr. McGoff, considered this incident to be a serious violation of Department Standards because DOC employees supervise those who have broken the law and the possibility of confinement with others who may come into the DOC undermines the authority of the staff member in question.

27. Complainant's actions in this matter did not effect his job performance.

28. Complainant is presently appealing his El Paso County Court conviction of three (3) misdemeanors: assault, menacing and harassment and his sentence of thirty (30) days jail, on grounds of "ineffective assistance of counsel". Complainant's Counsel at the time failed to file a notice of alibi defense and therefore such defense was unavailable to Complainant at trial.

29. Complainant's "probation" for violation of a restraining order was terminated after a finding of Not Guilty (Complainant's Exhibit A) and/or completion of court-ordered classes. Complainant was briefly incarcerated in this matter (one (1) day) in December 1997 which was later determined to be improper. He verbally notified his supervisor after the incarceration. The charges in this case were based on a verbal confrontation, in 1995, between Complainant and his ex-wife over the lack of clothing made available for Complainant's son.

30. At the R833 meeting, Complainant did not present information or documentation regarding the Not Guilty finding. Therefore it was not considered by the appointing authority in making his decision.

31. Regarding Complainant's District Court (felony) charges, violation of a restraining order and tampering with a witness, the first is still pending. Complainant has entered a Not Guilty plea to that charge. The second charge, tampering with a witness, was dismissed on February 12, 1998. (Complainant's Exhibit C.)

DISCUSSION

The burden is upon Respondent to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994). The administrative law judge,

as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent argues that it met its burden both with regard to 1.) whether or not the act or omission occurred and 2.) whether just cause warrants the discipline imposed. There is little dispute as to whether or not the act(s) or omission(s) occurred. Complainant's criminal charges, court dates and dispositions are now clear. Complainant admits that he did not give written notice of the charges, court dates or disposition of the matters involved.

The remaining question is: Does just cause warrant the discipline imposed? In this case a disciplinary termination was imposed for failure of Complainant to properly notify the appointing authority. Others in the Food Service Department had been allowed to give only verbal notice of pending charges, courts dates, etc. Complainant knew about the notification requirements and believed he had complied with notification requirements by contacting Captain Knickerbocker, by telephone, on the evening of his incarceration.

Clearly, each of the three (3) criminal contacts (Findings of Fact 13., a., b., and c., above), considered by the appointing authority, stem from Complainant's "messy divorce". Complainant was not considered to be a criminal-type by the appointing authority. Nonetheless, whether he was subject to incarceration for true criminal behavior or for actions involving a difficult divorce, Complainant was required to notify the appointing authority *in writing* regarding the possibility of incarceration. The issue is not *why* a staff member is incarcerated. It is the *possible* incarceration with others who may later be incarcerated at DOC and the undermining of DOC staff authority. Therefore the notice must be made *prior to* court appearances and certainly before sentencing and incarceration.

Complainant did not so notify anyone at DOC. In fact this was the second time he had failed to properly notify anyone regarding possible incarceration. In December, 1997 Complainant notified his supervisor *after* his one (1) day incarceration on violation of a restraining order. The one (1) day jail time was later determined to have been improper but written notification at the time of the filing of charges, or at the entry of a plea, or of the date of trial/hearing, or even of the date of sentencing would have met the requirements and given Complainant options other than notice after the fact.

Complainant's request for segregation from the regular jail population indicates that he understood the reasoning that supports the notification requirement. In this case Complainant could have called Captain Knickerbocker the night before his court appearance on June 8, 1998 or that morning before trial. More importantly, he could have and should have informed DOC in writing regarding the pending nature of the charges when he first became aware of the charges. Instead he waited until he was actually incarcerated to call Captain Knickerbocker. After his release, Complainant met with Captain Knickerbocker and verbally informed the Captain regarding new felony charges but, again, he did not notify DOC in writing.

Other employees who gave verbal notice of their court matters were involved in strictly

misdemeanor matters. Once a DOC employee was involved in a felony matter the requirement for written notification was never waived.

Complainant's attorney argues that Complainant substantially complied with the notification requirement. Perhaps, if Complainant had provided written notification of the felony charges, even if provided to a supervisor rather than the appointing authority, there would be substantial compliance. However, the facts show that Complainant provided little if any concrete facts about any of the charges against him throughout his employment at DOC including through the R833 meeting process. At the R833 meeting Complainant did not tell the appointing authority about the status of his appeal or about the termination of his probation or about the circumstances of his latest charges.

Perhaps if Complainant had spoken earlier (*before* incarceration) and more freely (expressing his own confusion regarding the charges against him) to his supervisors, the disciplinary action might have been less that termination. However, termination was an option available to the appointing authority. The appointing authority considered all information given to him and investigated further. He did not have all the information available at hearing but given the information available to the appointing authority, he made a reasonable decision. His decision to terminate Complainant's employment was based on facts and supported by DOC rules. It was not arbitrary, capricious or contrary to rule or law.

CONCLUSIONS OF LAW

1. Complainant did not notify his supervisor(s) or the appointing authority in writing, regarding his criminal court matters, as required by Colorado Department of Corrections, Administrative Regulation No. 1450-1, IV., S.

2. Just cause warranted disciplinary termination in this matter because Complainant on three (3) occasions failed to file written notice of his pending criminal charges. His verbal notice in two (2) of these matters was given only after incarceration had begun.

3. The disciplinary termination in this matter was based on fact and Department of Corrections rule and, as such, was not arbitrary, capricious or contrary to rule or law.

4. Complainant is not entitled to costs including attorney's fees.

ORDER

1. The actions of Respondent are **affirmed.**

Dated this 5th
day of June 1998
at Denver, CO

Michael Gallegos
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this _____day of June, 1998, I placed true copies of the foregoing **INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Mr. Joseph D. Dirscherl
405 S. Cascade Ave., #202
Colorado Springs, CO 80903

and in the interoffice mail to:

Mr. John A. Lizza
First Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203

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